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May 12, 1995

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

Mr. William Caton
Acting Secretary
Federal Communications Commission
1919 M Street, N.W.
Room 222
Washington, D.C. 20554

Re: Application for Review and Request for Stay
-- GN Docket No. 93-253; ET Docket No. 92-100

Dear Mr. Caton:

Transmitted herewith on behalf of the National Association of Black Owned Broadcasters, Inc. ("NABOB"), Percy E. Sutton, individually, and the National Association for the Advancement of Colored People Washington Bureau ("NAACP"), (collectively referred to as the "Minority Petitioners") are an original, four hard copies and three microfiche copies of the Application for Review and Request for Stay of the Minority Petitioners.

Please contact undersigned counsel should you have any questions concerning this matter.

Sincerely,

James L. Winston

JLW/kn

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Deferral of Licensing of MTA	)	GN Docket No. 93-253
Commercial Broadband PCS	)	ET Docket No. 92-100

To: The Commission

APPLICATION FOR REVIEW AND REQUEST FOR STAY

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May 12, 1995

SUMMARY
OF
APPLICATION FOR REVIEW AND REQUEST FOR STAY

The National Association of Black Owned Broadcasters, Inc. ("NABOB"), Percy E. Sutton, Individually, and the National Association for the Advancement of Colored People Washington Bureau ("NAACP"), (collectively referred to as the "Minority Petitioners"), request review of the Order of the Chief, Wireless Telecommunications Bureau in the above-captioned proceeding, denying the "Emergency Motion to Defer MTA PCS Licensing" filed March 8, 1995, by Communications One, Inc. ("COI"). Deferral of Licensing of MTA Commercial Broadband PCS, GN Docket No. 93-253, ET Docket No. 92-100, released April 12, 1995.

The Minority Petitioners submit that the Bureau's Order fails to comply with the Commission's obligations under Section 309(j) of the Communications Act, 47 U.S.C. Section 309 (j). Pursuant to Section 309(j) the Commission is obligated to: (1) avoid excessive concentration of licenses in PCS, (2) disseminate licenses to a wide variety of applicants, specifically including businesses owned by members of minority groups, and (3) promote economic opportunity for businesses owned by members of minority groups. If the Commission licenses A and B block PCS frequencies before the Commission is ready to license C block frequencies, the Commission will violate its statutory obligations under Section 309(j). Such licensing will place C block licensees at such a substantial competitive disadvantage that prospective C block licensees will be unable to raise capital to create viable businesses in competition with the A and B block winners.

The Commission's decision not to take any steps to further its statutory obligation to promote minority ownership in the A and B licenses has resulted in a situation in which the Commission will fail to comply with its statutory obligation to promote minority ownership. The ongoing delays in the licensing of C block frequencies will leave prospective licensees in this block with no viable business opportunities. This situation would have been avoided if the Commission had complied with its statutory obligation in all frequency blocks including the A and B blocks -- rather than to relegate its compliance to a limited frequency "ghetto" in the C and F blocks.

In addition, 61% of the A and B block licenses were obtained by three bidding entities comprised of combinations of the companies which already dominate control of the communications industry. Moreover, the bidding in which these entities engaged exhibited clear indications that there was a tacit agreement to avoid significant bidding against each other and to engage in a territorial allocation of the A and B licenses among themselves. An investigation of this conduct should also be performed before the A and B blocks are licensed.

This situation is exacerbated by the likelihood that the C block auctions scheduled to begin August 2, 1995 will not actually begin on that date. The C block auctions have been caught up in a series of legal challenges which show no immediate likelihood of abating. Licensing the A and B block frequencies while the C block auctions have yet to begin and while the C block continues to be threatened with additional court delays will place the prospective C block licenses at a competitive disadvantage so great that it would amount to an abrogation of the Commission's statutory obligation under Section 309(j).

The Minority Petitioners submit that we are likely to prevail on the merits of our appeal, we will be irreparably harmed by denial of the requested stay, others will not suffer substantial harm by grant of the requested stay, and a stay will serve the public interest. Therefore the requested stay should be granted.

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To: The Commission

APPLICATION FOR REVIEW AND REQUEST FOR STAY

The National Association of Black Owned Broadcasters, Inc. ("NABOB"), Percy Sutton, Individually, and the National Association for the Advancement of Colored People ("NAACP"), Washington Bureau (jointly referred to herein as "the Minority Petitioners"), by their attorneys, pursuant to Section 1.115 and 1.43 of the Commission's Rules and Regulations, hereby file this application for review of the Order released April 12, 1995, by the Chief, Wireless Telecommunications Bureau in the above-captioned proceeding denying the "Emergency Motion to Defer MTA PCS Licensing" ("Motion"), filed March 8, 1995 by Communications One, Inc. ("COI"). The Minority Petitioners request that the Commission reverse the Bureau decision and stay the licensing of the A and B block broadband PCS frequencies until the Commission is ready to license the C block frequencies.

In its Motion, COI requested that the Commission defer licensing of the A and B blocks in the 2 GHz Personal Communications Service ("PCS"), because the United States Court of Appeals for the District of Columbia Circuit had imposed a stay on the auctioning of frequencies for C block licenses. In its Order, the Bureau ruled that the existence of the stay of the C block auctions did not require the Commission to stay the licensing of the A and B blocks. Order at 3.

The Minority Petitioners submit that the Bureau's Order fails to recognize the Commission's statutory obligation with respect to the conduct of broadband PCS auctions and is in fact violative of that statutory obligation. In fact, the stay must be issued to comply with the Commission's statutory obligation.

The requested stay is also required because serious restraint of trade issues have been raised by the A and B auctions, and the stay is necessary to prevent irreparable damage to the public interest which the activities in restraint of trade have created. The Minority Petitioners therefore request that the Commission reverse the Bureau's decision and stay the licensing of the A and B block frequencies until the Commission is ready to license the C block frequencies. In support of their request, the Minority Petitioners submit the following:

I. STANDING

1. The Minority Petitioners have standing to seek the requested stay. NABOB is a national trade association representing the interests of current FCC licensees, primarily in the broadcast industry, and prospective minority applicants in the PCS auctions. Percy E. Sutton is an African American, a resident of the State of New York, and a citizen of the United States, planning to bid for C block PCS licenses. The NAACP is the nation's oldest and largest civil rights organization, and its Washington Bureau represents the interests on a national basis of: (1) minority entrepreneurs who plan to bid in the PCS auctions, and (2) the public, which will be harmed if the PCS industry does not develop into an open competitive industry.

NABOB and the NAACP have a particular interest in the nation's rapidly evolving telecommunications policy. As with other Americans, African Americans will benefit from the potential of the "information superhighway" only if that potential is realized in our communities. NABOB and the NAACP have been active in fostering an awareness and appreciation of evolving communications technologies within the African American community, and in representing the interests of prospective applicants and consumers before the Commission, Congress and the Executive Branch. NABOB has filed numerous pleadings in this proceeding. Therefore, the Minority Petitioners have standing to file this Application for Review and Request for Stay. See United Church of Christ v. FCC, 359 F.2d 994, 1005, 53 RR2d 2001, 2013-2014 (D.C. Cir. 1966); Michael Matheson et. al., 53 RR2d 997, 998 (1983); and Baltimore Area Renewals, 89 FCC 2d 1183, 51 RR2d 727 (1982).

II. BACKGROUND

A. Congress Directed the FCC to Promote Opportunities for Minorities to Acquire PCS Licenses

In 1993, Congress passed the Omnibus Budget Reconciliation Act which included Section 309(j) of the Communications Act, 47 U.S.C. Section 309(j).[1]

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[1] Section 309(j) provides, in pertinent part, as follows:

(1) Design of systems of competitive bidding

For each class of licenses or permits that the Commission grants through the use of the competitive bidding system. ... the Commission shall include safeguards to protect the public interest in the use of the spectrum and shall seek to promote the purposes specified in section 151 of this title and the following objectives:

(a) the development and rapid deployment of new technologies, products, and services for the benefit of the public, including those residing in rural areas, without administrative or judicial delays;

It is clear from a plain reading of Section 309(j) that the FCC has a statutory obligation in its PCS auctions to: (1) avoid administrative and judicial delays, (2) avoid excessive concentration of licenses, (3) disseminate licenses to businesses owned by minorities, and (4) promote economic opportunity for businesses owned by minorities. As shall be demonstrated below, a

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(b) promoting economic opportunity and competition and ensuring that
(Continued . . . .)

(. . . . Continued)

> new and innovative technologies are readily accessible to the American people by avoiding excessive concentration of licenses and by disseminating licenses among a wide variety of applicants, including small businesses, rural telephone companies, and businesses owned by members of minority groups and women ...
>
> (2) Contents of regulations
>
> In prescribing regulations pursuant to paragraph (3), the Commission shall-
>
> (a) consistent with the public interest, convenience, and necessity, the purposes of this chapter, and the characteristics of the proposed service, prescribe area designations and bandwidth assignments that promote (I) an equitable distribution of licenses and services among geographic areas, (ii) economic opportunity for a wide variety of applicants, including small businesses, rural telephone companies and businesses owned by members of minority groups and women, and (iii) investment in rapid deployment of new technologies and services;
>
> (b) ensure that small businesses, rural telephone companies, and businesses owned by members of minority groups and women are given the opportunity to participate in the provision of spectrum-based services, and, for such purposes, consider the use of tax certificates, bidding preferences, and other procedures ...

(Emphasis added).

grant of the requested stay is necessary for the FCC to comply with its statutory mandate.

B. Section 309(j) Was Needed to Enable Minority Owned Businesses to Compete with the Carriers for Whom Cellular Telephone Licenses Were "Set-aside"

The adoption of Section 309(j) grew, in part, from an earlier Commission action which sought to encourage the development of the cellular telephone industry. The FCC "set-aside" one of the two available cellular frequencies in each market and reserved them for the wireline carriers of each community. An Inquiry Into the Use of the Bands 825-845 MHZ and 870-890 MHZ for Cellular Communications Systems; and Amendment of Parts 2 and 22 of the Commission's Rules Relative to Cellular Communications Systems, 86 FCC 2d 469, 49 RR2d 809, 821-826 (1981). In most markets, this meant that the FCC's preferences went to the local telephone companies of the then AT&T/Bell System, now known as the Regional Bell Operating Companies (RBOCs). Id. Given this affirmative government assistance, the wireless telephone side of the RBOCs businesses are now booming. However, there is virtually no minority ownership presence in the wireless telephone industry, largely as a result of discriminatory lending practices. See Implementation of Section 309(j) of the Communications Act, Competitive Bidding, 8 FCC Rcd 7635, 7648 (1993), citing the "FCC Small Business Advisory Committee (SBAC) Report to the Federal Communications Commission Regarding Gen. Docket 90-314" (September 15, 1993), and 9 FCC Rcd 5536, 5571-5579, citing, inter alia, Small Business Credit and Business Opportunity Enhancement Act of 1992, Sections 112(4), 331(a)(3), (a)(4) and (b)(2)(3), Pub. Law 102-366, Sept. 4, 1992; Mortgage Lending in Boston: Interpreting MHDA Data, Federal Reserve Bank of Boston, Working Paper 92-7 (October 1992).

Recently, the FCC's ~~minority ownership~~ programs to enhance minority ownership within the broadcast industry have been unjustly criticized as improper "set-asides." This is especially ironic given that the revenues of the multibillion dollar cellular industry are going into the coffers of the traditional wireline carriers because they received the largest "set-aside" in the history of the Communications Act. The bleak record of minority participation in the common carrier services is a direct reflection of the disproportionate control that the RBOCs and long distance carriers have maintained over the industry.

It was against this backdrop that Congress directed the Commission to develop procedures and incentives to encourage the entry of minorities and other "designated entities" into what is essentially a segregated industry.

C. It is Unlikely that the C Block Auction Will Actually Begin on August 2, 1995

The history of this proceeding demonstrates that it is unlikely that the C block auction will actually begin on August 2, 1995. The Commission released a Notice of Proposed Rule Making in this proceeding on October 13, 1993, proposing rules for the auctioning of PCS frequencies. Implementation of Section 309(j) of the Communications Act, Competitive Bidding, 8 FCC Rcd 7635 (1993). On June 29, 1994, the Commission adopted rules for the auction of broadband PCS licenses in a series of auctions. See, Implementation of Section 309(j) of the Communications Act -- Competitive Bidding, Fifth Report and Order, 9 FCC Rcd 5532 (1994) ("Fifth R&O").

As part of its rules, the Commission:

- Reserved two "entrepreneurs" blocks, the C and F blocks[2], for bidding only by

[2] In designing the PCS frequency allocation plan, the Commission had previously created six frequency blocks -- A, B, C, D, E and F. Amendment of the Commission's Rules to Establish New Personal Communications Services, 9 FCC Rcd 4957, 4970 (1994).

companies with annual revenues below $125 million; controlled by "designated entities," divided into geographic divisions known as basic trading areas (BTAs);

- Extended to minorities and women eligible for the entrepreneurs blocks a bidder's credit of up to 25% -- in theory, a significant discount off the winning auction bid for an entrepreneurs block license;

- Allowed larger firms to make non-majority, non-controlling equity investments in companies owned by minorities and women without voiding those companies' eligibility to bid for the entrepreneurs blocks; and

- Extended tax certificates to entities that invest in PCS firms owned by racial minorities and women, or that sell licenses to such businesses.[3]

9 FCC Rcd at 5580.

The Commission announced that there would be an initial auction of A and B block licenses for MTA frequencies. 9 FCC R2d at 5546-5547. However, no provision was made in those auctions to encourage participation by minorities, women, small businesses and rural telephone companies, although such participation in the Commission's auctions is required by the Omnibus Budget Reconciliation Act which provided the Commission statutory authority to conduct such auctions. See, e.g. 47 U.S.C. § § 309(j)(4)(D).

The Commission stated that it would comply with the statutory directive to make opportunities available for the designated entities by holding subsequent auctions for the C and F block licenses where it would implement its rules to encourage participation by the designated entities. Fifth R&O, 9 FCC Rcd at 5546-47.

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[3] Congress recently repealed Section 1071 of the Internal Revenue Code which authorized the Commission to issue tax certificates. Section 2, H.R. 831, Self-Employed Health Act, signed by the President in April, 1995. Therefore, tax certificates are no longer available for PCS investors.

On September 19, 1994, the Commission announced it would begin A and B block auctions on December 5, 1994. FCC Public Notice released September 19, 1994. On December 23, 1994, the Commission announced that it would begin C block auctions April 17, 1995.

On February 10, 1995, the Commission announced that the C block auctions would be postponed and would commence 75 days after the conclusion of the A and B block auctions. FCC Public Notice released February 10, 1995.

On March 13, 1995, the Commission announced that the A and B block auctions had been completed. FCC Public Notice released March 13, 1995. It appeared that auctioning of the C block would begin as scheduled.

However, on March 15, 1995, the U.S. Court of Appeals issued a stay of the C block auctions as the result of an appeal filed by Telephone Electronics Corporation ("TEC"), a rural telephone company. Telephone Electronics Corporation v. FCC, No. 95-1015 (Order, March 15, 1995). TEC alleged in its appeal that the Commission's size limitation rule, which would preclude TEC from bidding in the C and F block auctions, was arbitrary. TEC Petition for Review, filed January 6, 1995, at 2. The Commission announced that the auctioning of the C block frequencies would be suspended until the stay was lifted. FCC Public Notice released March 15, 1995.

On March 28, 1995, TEC filed a "Request for Waiver of Section 24.709(a)(1) of the Commission's rules, seeking a waiver of the size limitation rule ("TEC Waiver Request"). On April 14, 1995, a TEC subsidiary, Bay Springs Telephone Company, Inc., along with PCS Primeco L.P. and Peterson County Communications, L.P. filed a request with the Commission for approval of a partitioning plan which rendered moot TEC's Request for Waiver. Letter to William F. Caton, Secretary, FCC, from Bay Springs Telephone Company, Inc. et. al., April 14,

1995. On April 18, 1995, the Commission approved the partitioning plan. Partitioning Plan of Bay Springs Telephone Company, PCS Primeco, L.P. and Peterson County Communications, L.P., Declaratory Order, DA 95-865 (released April 18, 1995). On April 19, TEC moved to dismiss its Petition for Waiver.

On May 1, 1995, the Court of Appeals dissolved the stay. TEC v FCC, Order, May 1, 1995. The Commission has now scheduled the C block auctions to begin August 2, 1995.

However, it is quite questionable whether the C block auctions will actually begin on that date. Another rural telephone company, Consolidated Communications, Inc. ("CCI") is now seeking to have its Comments filed in connection with the TEC Waiver Request treated as a request for a waiver similar to that requested by TEC. Letter to William F. Caton, Secretary, FCC from Consolidated Communications Inc., April 19, 1995. In addition, on April 24, 1995, Radiofone, Inc. filed a "Request for Stay" of PCS license auctioning. Request for Stay, filed by Radiofone, Inc., April 24, 1995 at 1. Given that the Court of Appeals has demonstrated a willingness to consider the merits of the arguments raised by the TEC request, it is possible that the Court may issue another stay before August 2, 1995.

It now appears that the Commission's decision not to include any incentives for minority ownership in the auction rules for the A and B block licenses may result in a complete failure to comply with its statutory mandate. The auctioning of C block licenses remains under a cloud. Although the Court of Appeals has lifted the stay which it imposed as part of the TEC litigation, the CCI and Radiofone requests continue to leave the C block auction date in jeopardy. It is possible that another stay may be issued by the court prior to the scheduled auction date.

III. THE COMMISSION HAS FAILED TO COMPLY WITH ITS STATUTORY MANDATE

A. The Commission's Decision to Provide No Incentives for Minority Ownership in the a and B Block Auctions Has Resulted in a Failure to Comply with Its Statutory Mandate

The uncertainty surrounding the timing of the C block auctions is traceable to the Commission's decisions: (1) to auction A and B block licenses separate from the C block licenses, (2) to auction the A and B block licenses prior to auctioning the C block licenses, and (3) to include no incentives for bidding by the designated entities in the A and B block auctions. NABOB opposed each of these decisions. In particular, as early as November 10, 1993, NABOB urged the Commission to apply any policies designed to promote minority ownership to all frequencies to assure that minorities were not relegated to a few inferior frequencies. NABOB Comments filed November 10, 1993 at 9-10. However, the Commission disregarded NABOB's request, and now the result predicted by NABOB is upon us.

Each day that the A and B block licenses are granted ahead of the C block licenses will reduce the value of the C block licenses. The Commission has received a great deal of information from various sources in this proceeding stressing the importance of providing incentives to enable minority owned companies to become viable competitors in the PCS industry, Fifth R&O, 9 FCC Rcd at 5571-5579. The Commission's efforts to address that problem will be eviscerated if the Commission licenses A and B block frequencies before the Commission is ready to license C block frequencies. If the Commission's C block auctions are delayed and the licensing of the A and B block frequencies continues without being stayed, the A and B block licensees will gain such a tremendous headstart that they will preempt the market from prospective C block licenses. Unlike television stations and radio stations, the average consumer has no need for more than wireless telephone licensee. Once the A and B block winners have obtained a substantial headstart, there will be little opportunity for persons interested in purchasing C block frequencies to develop a successful business. This is especially true given the dominant position in the telephone industry already held by the large winners of the A and B block licenses.

The result will be that the Commission will have created a PCS industry in which there will be an "excessive concentration of licenses" in the hands of the large A and B block winners, there will be no "dissemination" of licenses to businesses owned by members of minority groups, and the Commission will have failed to "promote economic opportunity" for businesses owned by members of minority groups, as required by Section 309(j). A stay of the licensing of the A and B block licenses is necessary to prevent this result.

Therefore, the Commission has a statutory obligation to stay the licensing of the A and B block frequencies until the C block frequencies are ready for licensing.

B. The Commission's Decision to Provide No Incentives for Minority Ownership in the A and B Block Auctions Allowed the Dominant Carriers to Divide PCS Licenses in an Unlawful Territorial Allocation

When the FCC first began its rulemaking for the PCS auctions, the field of prospective bidders consisted of numerous companies that appeared to be logical competitors for the PCS licenses: AT&T, McCaw Cellular, NYNEX, Bell Atlantic, U.S. West, Air Touch Communications, Sprint, TCI, Cox Communications, Comcast, MCI, Ameritech, Bell South, GTE and Southwestern Bell.

However, when applications were received by the FCC for its "A" and "B" frequency blocks on October 24, 1994, this list of prospective "competitors" had consolidated itself into a mere handful:

1. AT&T had acquired McCaw Cellular and turned it into AT&T Wireless PCS, Inc.;

2. Three RBOCs -- NYNEX, Bell Atlantic and U.S. West -- joined with Air Touch Communications to form PCS Primeco, L.P.; and

3. Sprint, TCI, Cox Communications and Comcast came together to form Wireless Co., L.P and Phillie Co., L.P. (Comcast did not participate in Phillie Co., L.P.)

This occurred even though the Commission's PCS rules provided incentives for existing telecommunications companies to enter into strategic partnerships with designated entities -- partnerships which were invisioned to permit both entities to maximize their positions in the licensing process and the industry. Given the previously stated intention of several major bidders, including several of the RBOCs, to develop "national foot-prints" within the PCS industry, it was anticipated that the spectrum blocks for which they could bid would not provide enough license capacity for the many anticipated bidders.

The FCC reasoned that seeking additional frequency access, the bidders in the A, B, D and E blocks would turn to the "C" and "F" blocks for the purpose of mutually beneficial joint ventures with designated entities. 9 FCC Rcd at 5579. By partnering with an existing telephone company, the designated entity could avoid being stymied in the start-up of its company by existing competitors who might: deny access to telephone interconnection, deny sharing of facilities, overprice shared facilities, interfere with the development of important equipment vendor relationships or take other steps to thwart new competition.

The FCC and many designated entity companies spent much of 1993 and 1994 working to develop procedures which would facilitate joint ventures without allowing the existing telecommunications companies to control and dominate these joint ventures. Unfortunately, while the FCC and the designated entities were moving in one direction toward support of the Commission's diversity of ownership policy, certain of the existing telecommunications companies were working to join forces to keep the designated entities from entering their markets. It appears that they succeeded. Thus, the FCC's plan for a truly competitive auction of PCS licenses was subverted long before the opening auction gavel ever fell.

The PCS bidding which resulted for the A and B frequencies took on the classic characteristics of a "territorial allocation," an unfair business practice under existing antitrust law. See United States v. Topco Associates, Inc., 405 U.S. 596 (1972); Hobart Bros. Co. v. Malcolm T. Gilliand, Inc., 471 F.2d 894 (5th Cir.), cert. denied, 412 U.S. 923 (1973); United States v. American Smelting and Refining Co., 182 F. Supp. 834 (S.D.N.Y. 1960). Companies which, if bidding separately, would have been expected to compete for licenses covering several geographic areas, by joining their competitors, bid for only those markets not already controlled by their new partners -- i.e. their former competitors. Moreover, the activity of the aligned RBOCs appears particularly anti-competitive, since they did not bid in markets where any other RBOC was bidding. This appeared to reflect an "I won't bid against you, if you don't bid against me" understanding.

Further, having joined with their new partners/former competitors to bid for only a handful of PCS licenses in areas not already controlled by their new partners, these major telecommunications companies have been able to gain control of all of the PCS frequencies they desire in the A & B frequency block auctions, without ever joining with minority owned companies in the C block auctions.

The result is that in the A & B auctions there were only five winners for the 17 licenses available in the top ten markets, and only 10 winners for the 37 licenses available in the top twenty markets.

In the top twenty markets, AT&T had 10 high bids; WirelessCo had 11; and PCS Primeco had 7 high bids. Of the 99 licenses auctioned, WirelessCo won 29, AT&T won 21 and PCS Primeco won 11, representing 61% of the licenses auctioned. These companies effectively divided the most lucrative markets in America among themselves. Moreover, when combined with their current wireline telephone, and cellular and cable holdings, the major telecommunications companies have positioned themselves to dominate the wireless telephone industry, both PCS and cellular.

It should be noted that several of the companies engaged in these partnerships are not new to U.S Justice Department antitrust inquiry.

AT&T was compelled under federal court order to divest its local telephone monopoly because of its anticompetitive conduct. United States v. AT&T, et. al., 103 S.Ct. 1240 (1982) (the "Modified Final Judgment" or "MFJ"). The acquisition of McCaw Cellular and PCS licenses across the country will allow AT&T to recreate many aspects of its local telephone monopoly to the potential detriment of the national interest.

Similarly, PCS Primeco, consisting of NYNEX, Bell Atlantic and U.S. West, and an RBOC-spin-off, Air Touch Communications, is another cluster of companies with preexisting anticompetitive relationships. Moreover, while AT&T sought and obtained U.S. Justice Department approval for its acquisition of McCaw, neither NYNEX, Bell Atlantic, U.S. West, nor Air Touch Communications obtained prior approval for their partnership. Given the Justice Department determination that Air Touch is subject to the MJF, this amounts to a combination of more than half of the former Bell Operating Companies as a single PCS license holder.

The consolidation of competitors in the telephone industry for the purpose of the PCS auctions has had a "chilling effect" on the ability of minorities to enter into the PCS industry. Minorities seeking to bid for "C" and "F" block licenses must now convince financial institutions and investors that they can effectively compete against competitors consisting of financially well-positioned RBOCs, long distance carriers and cable companies. It is increasingly likely that few African American owned companies will be able to raise the capital to successfully compete against these new alliances.

IV. THE MINORITY PETITIONERS' REQUEST FOR STAY MEETS THE FOUR-PRONGED TEST FOR GRANTING A STAY

The Commission must evaluate a request for stay pursuant to a four-pronged test established by the courts. To prevail, the Minority Petitioners must demonstrate that: (1) it is likely we will prevail on the merits; (2) we will suffer irreparable harm if a stay is not granted; (3) other interested parties will not be harmed if the stay is granted; and (4) the public interest favors grant of a stay. See, Washington Metropolitan Area Transit Comm'n. v. Holiday Tours, Inc., 559 F.2d 841, 843 (D.C. Cir. 1977). As shall be demonstrated below, the Minority Petitioners' request meets these requirements.

A. The Minority Petitioners Are Likely to Prevail on the Merits of Their Application for Review

The Minority Petitioners have a substantial likelihood of prevailing on the merits of their application for review. The Minority Petitioners have shown above that the Commission's refusal to stay the issuance of licenses to the winners of the A and B block auctions constitutes a violation of its statutory obligations.

The Commission acknowledged repeatedly in the development of its auction rules that the statutory obligation to disseminate licenses among businesses owned by members of minority groups was imposed by Congress in recognition that minorities require added safeguards in the auction process to assure that they will have a reasonable opportunity to compete with the larger dominant carriers. See generally, Fifth R&O, 9 FCC Rcd at 5536, 5571-5581. When the Commission adopted its rules establishing the entrepreneur frequency blocks, the Commission stated that the special rules applicable to that block were adopted because they were needed to enable minorities and other designated entities to compete with the larger companies expected to bid in the A and B blocks. Id. At 5571.

The record of this proceeding clearly demonstrates that the large carriers who prevailed in the A and B block auctions have many existing competitive advantages over minorities. 9 FCC Rcd at 5571-5579. The provision of any additional competitive advantages to the A and B block winners by the Commission is contrary to the Commission's statutory obligations. The Commission's decision to deny the COI Motion amounts to giving the A and B block winners an excessive competitive advantage and will result in a concentration of licensees in the hands of the A and B winners.

The Bureau denied the Motion of COI in spite of the existence at that time of the Court of Appeals stay which prevented the conduct of C block auctions. In denying that Motion, the

Bureau stated: "We disagree with COI's suggestion that the possibility of a delay of the C block auction presents a new circumstance that the Commission did not previously consider." Order at 3. The Bureau then added: "To the contrary, the Commission's decision to proceed with the first phase of PCS licensing before subsequent auctions were conducted or scheduled demonstrates that it considered prompt licensing of PCS to be paramount even though the timing of future auctions remained unknown." Id.

The Bureau's interpretation of the Commission's prior orders suggests that the Commission had no regard for whether minorities and other designated entities were provided any meaningful opportunity to compete with the A and B block winners. The Bureau suggests that when auctions would be held for the C block was irrelevant to the Commission's decision to conduct the A and B block auctions. The Bureau's Order is contrary to the Commission's prior orders in this proceeding. In disregarding the potential impact of a substantial head start by the A and B block licensees, the Bureau failed to acknowledge the Commission's statutory obligation under Section 309(j). The Commission could have complied with this obligation by providing incentives for minorities to participate in all auctions, including the A and B auctions. As noted above, such a plan of action was specifically proposed by NABOB at the earliest stages of this proceeding. NABOB Comments, filed November 10, 1993, at 9-10. However, the Commission rejected NABOB's proposal, and decided instead to comply with its statutory mandate in only certain frequency blocks. Fifth R&O, 9 FCC Rcd at 5536.

The Commission's decision to restrict the frequency blocks in which it will seek to comply with its statutory mandate is likely to result in the denial of any meaningful opportunity for minorities to obtain any economic opportunity in broadband PCS. For the Commission to proceed with the licensing of A and B block frequencies before it is in a position to license C block frequencies is a clear abdication of its statutory obligation to "avoid excess concentration of licenses" in the hands of the A and B winners, "disseminate" licenses to, and "promote economic opportunity" for minorities. See Section 309(j). The Minority Organization therefore are likely to prevail on the merits of their application for review.

B. The Minority Petitioners will be Irreparably Harmed by Denial of the Requested Stay

The Minority Petitioners and the prospective bidders they represent will be irreparably harmed by a denial of the requested stay. The Commission's prior orders in this proceeding have discussed in great detail the competitive advantages of the larger carriers, which have been the principal winners of the A and B block auctions. See, e.g. Fifth R&O, 9 FCC Rcd at 5536-40 and 5571-81. The Commission's rules restricting bidding by large companies in the C block auctions were specifically designed to help minorities overcome the competitive disadvantage they face in comparison to the larger companies. The Bureau's Order completely ignores the record on this issue.

Among the injuries which prospective C block bidders will experience are:

1. Loss of Access to capital. Investors will be disinclined to invest in C block licenses if the timing of bidding is substantially behind the recently concluded A and B bidding. See PCS Week, February 22, 1995, at 1, 4.

2. Loss of base station cell sites. A and B licensees will be able to enter into purchase or lease agreements for prime base station locations precluding

subsequent C block licensees from obtaining access to those sites, and thereby possibly precluding C block licensees from being able to serve some geographic areas at all.

3. Loss of access to distributors and retailers. The A and B licensees will be able to enter into distribution, resale and other agreements with the preferred business establishments in a geographic area.

4. Loss of market share. By getting to market first the A and B licensees will be able to develop a substantial customer base before the C block licenses are issued.

Of the disadvantages listed, loss of access to capital has been recognized in the Commission's prior orders as a serious difficulty for minorities. See, e.g. Fifth R&O 9 FCC Rcd at 5572-74. As a result of the uncertainty surrounding the auction timetable for C block licenses, the disadvantage experienced by minorities in raising capital has been exacerbated. If minorities experience an inability to access capital resulting from the impending licensing of the A and B block frequencies, combined with the delay of the C block auctions, this is the same as denying minorities an opportunity to participate in PCS. Therefore, minorities will be irreparably harmed by the planned rapid licensing of A and B block frequencies.

C. Others Will Not Suffer Substantial Harm by Grant of the Requested Stay

The requested stay will not substantially harm any other party. The only parties who would be affected by the stay are the winners of the A and B block auctions. Those parties will experience no significant prejudice as a result of the grant of a stay. The A and B block winners are not currently conducting PCS business. Therefore, the stay will not prevent them from engaging in a current business enterprise. Moreover, the A and B winners are not required to pay the remaining 80% balance of their auction payments until the FCC grants their licenses. 9 FCC Rcd at 5563. Therefore, the delay will not require them to incur any additional FCC auction license expense until the stay is lifted.

D. A Stay Will Serve the Public Interest

A grant of the requested stay will serve the public interest by furthering the statutory obligation of the FCC to promote participation in PCS by minorities and other DEs. Congress has determined that it is in the public interest for minorities to participate in PCS. As the preceding sections of this Application for Review have demonstrated, there is a substantial public interest benefit being furthered by Congress in its requirements that the FCC: (1) avoid excess concentration of licenses, (2) disseminate licenses to businesses owned by members of minority groups and (3) promote economic opportunity for businesses owned by members of minority groups. A grant of the requested stay is essential for the intent of Congress to be fulfilled.